THE PROGRESS OF THE LAW, 1919–1921

EVIDENCE

THE word "progress" is somewhat ironical when applied to the enormous outpouring of American decisions on Evidence. The best proof of progress in this branch of the law would be its virtual disappearance from our appellate courts. It is not concerned with defining human rights and duties, but with the mere mechanics of justice, which ought to have been settled long ago. Instead, a considerable portion of the time and thought of our highest courts is diverted from fundamental problems of property, contract, industrial disputes, bankruptcies, railroad rate regulation, taxes, constitutional law, in order to decide whether certain testimony is hearsay or what questions are proper on cross-examination. The American decisions on Evidence for one month require thirty double-columned pages — seven hundred and fifty headnotes — in the advance sheets of the American Digest.[1] The English Law Reports in twenty-one months contain on this subject twenty-five cases;[2] and all the headnotes on Evidence in their Digest, which are somewhat longer than our headnotes, cover for twenty-one

[1] September, 1921, advance sheets: "Evidence," 12½ pages; "Witnesses," 7½ pages; "Criminal Law," sub-heading "X, Evidence," 10 pages. No count is made of still other cases on Evidence under the sub-heading, "XII, Trial." Each page contains approximately twenty-five headnotes. Of course, the same point is sometimes digested under more than one key-number.

[2] In 1920, and the 1921 reports through October issue, the following cases relate to Evidence: Glebe Sugar Refining Co. *v.* Greenock, note 32, *infra*; Rex *v.* Lovegrove, [1920] 3 K. B. 643; Meadows *v.* Ellerman Lines, note 13; Thomas *v.* Jones, [1921] 1 K. B. 22 (C. A.); Rex *v.* Wood, [1920] 2 K. B. 179 (C. C. A.); Rex *v.* Paul, [1920] 2 K. B. 183 (C. A.); Rex *v.* Stanley, *ibid.*, 235 (C. A.); Rex *v.* Biggin, [1920] 1 K. B. 213 (C. A.); Lyle-Samuel *v.* Odhams, Ltd., [1920] 1 K. B. 135; O'Rourke *v.* Darbishire, [1920] A. C. 581; Percival *v.* Peterborough, [1921] 1 K. B. 414; Nesom *v.* Metcalfe, *ibid.*, 400; Ford *v.* Receiver, [1921] 2 K. B. 344; Barnett *v.* Cohen, [1921] 2 K. B. 461; Calmenson *v.* Merchants' Warehousing Co., [1921] W. N. 59 (H. L., Ir.); Perry *v.* Perry, [1920] P. 361; The Turid, [1920] P. 370; *In re* Wright, [1920] 1 Ch. 108; Stokes *v.* Whicher, [1920] 1 Ch. 411; L. & N. W. Ry. *v.* Ashton, [1920] A. C. 84; Craig *v.* Lamoureux, [1920] A. C. 349 (J. C.); *In re* Battie-Wrightson, [1920] 2 Ch. 330; *In re* Rees, [1920] 2 Ch. 59; Forgione *v.* Lewis, *ibid.*, 326; Kings *v.* Merris, [1920] 3 K. B. 566. Unofficial reports contain a few more cases, but the headnotes of these are included in the Digest calculation in the text.

months less than five double-columned pages. One man cannot winnow afresh the American output of the same period, and this article will be largely based on the cases which have already been selected by law reviews. The recent legislation has not been examined, but books and articles on Evidence will be noted, so that this discussion is little more than a survey of the American and English literature of the topic during the past two years.

Of English treatises, Taylor's two volumes, based largely on Greenleaf, have gone into the eleventh edition,[3] and Phipson, a much better text-book, into the sixth.[4] A third edition of the condensed Phipson has also appeared.[5] A similar American handbook has been based on Chamberlayne.[6] A notable case book has been compiled by Professor Hinton, containing many recent decisions and footnotes of great value.[7] No books on special topics have come to the writer's attention, either in Evidence proper or the interesting adjacent territory opened up by Wigmore's *Principles of Judicial Proof*,[8] which deals with the weight and significance of testimony. Mention may be made in this latter connection of a recent American review of a German publication now a few years old, *Justiz-Irrtümer*, by A. Hellwig,[9] giving examples of miscarriages of justice, several of which were based on confessions which proved to be false.

The war has affected the law of Evidence in two ways. First, it brought special tribunals into operation. Prize courts are charged by Baty [10] with unwisely discarding the rule observed in former wars, that captors' evidence shall not be received. American courts-martial had a new Code of Evidence drawn by Wigmore. Not enough has yet been written on its merits in action; and com-

[3] A TREATISE ON THE LAW OF EVIDENCE, etc., 11 ed., J. B. Matthews and G. F. Spear. 2 vols., London, 1920. Reviewed in 34 HARV. L. REV. 898.

[4] THE LAW OF EVIDENCE, 6 ed., London, 1921.

[5] MANUAL OF THE LAW OF EVIDENCE FOR THE USE OF STUDENTS, 3 ed., London, 1921.

[6] C. F. CHAMBERLAYNE, HANDBOOK ON THE LAW OF EVIDENCE, ed. A. W. Blakeman and D. C. Moore, Albany, 1919. Reviewed in 8 CAL. L. REV. 202.

[7] E. W. HINTON, CASES ON THE LAW OF EVIDENCE, St. Paul, 1919. Reviewed in 33 HARV. L. REV. 745; 8 CAL. L. REV. 357. T. W. HUGHES, CASES ON THE LAW OF EVIDENCE, Chicago, 1921, reached the writer too late for mention in the text.

[8] Boston, 1913.

[9] Minden (Westfalen), 1914. Reviewed in 11 J. CRIM. L. AND CRIM. 157.

[10] Thomas Baty, "Neglected Fundamentals of Prize Law" 30 YALE L. J. 34, 47.

parisons of it with civil trials and with French military justice would be worth while.[11] Secondly, in the prosecutions for the expression of opinions hostile to the war, under the Espionage Act and similar state legislation, intention to hinder the war was usually an essential element of guilt, and courts had much difficulty in determining what evidence of the defendant's mental state should be admitted, — *e. g.*, pro-German utterances before the United States was at war, socialistic speeches not specified in the indictment, conduct and language indicating loyalty. Attempts were made to get in large masses of testimony on the objects and necessity of the nation's action, such as the President's speeches, reports of eye-witnesses of the Russian Revolution, etc. In some trials the defendant was allowed to make a long unbroken statement of his political and economic views, in accordance with the continental practice in political offenses. If we are to continue to have such offenses in this country in time of peace, many interesting problems of evidence will require consideration.[12]

Signs of Change

The rules of Evidence improve slowly because there is so little to get excited about. They involve no class issues like injunctions in labor disputes, they have no such obvious effect on commerce as the subjects which the Commissioners of Uniform Laws have been working to put in order. To abolish one antiquated rule like the attesting witness requirement in one of the forty-eight states, demands the concerted and prolonged action of several disinterested lawyers. A reform is bound to go much faster if the pure love of improvement can annex some additional motive, more common if less altruistic; *e. g.*, a change may mean dollars and cents to many, as when the removal of the interest disqualification made it easier to collect honest debts, or it may have behind it the deep-rooted instincts of a profession like the dubious

[11] See D. B. Creecy, "Courts-Martial," 10 J. Crim. L. and Crim. 202, 207; L. K. Underhill, "Notes on the Procedure of Courts-Martial," 10 *ibid.*, 42, 45; E. Angell, "The French System of Military Law," 15 Ill. L. Rev. 545, 553.

[12] State *v.* Townley, 182 N. W. 773 (Minn., 1921); Stokes *v.* United States, 264 Fed. 18 (C. C. A., 8th Circ., 1920); Pierce *v.* United States, 252 U. S. 239 (1920); Schurmann *v.* United States, 264 Fed. 917 (1920), are examples. See Robert Ferrari, "The Trial of Political Prisoners Here and Abroad," 66 Dial, 647 (June 28, 1919); Z. Chafee, Jr., Freedom of Speech, index *sub* "Evidence," and Bibliography, page 379.

physician's privilege. Three different attempts to modify the law of Evidence have attained some success because of such ulterior motives. These three attacks are important, not merely for their own sake, but because observation of the actual working of a new modification within a limited sphere will enable us to decide whether it may be wisely adopted as a permanent general rule.

I. *Workmen's Compensation Acts.* These statutes in several jurisdictions establish new presumptions shifting the burden of coming forward with evidence upon the defendant, in situations where the workman's right to relief is considered probable though difficult to prove, and dispense with the rules for the exclusion of testimony such as the hearsay rule. This action is obviously due, not merely to popular dissatisfaction with these rules, but to the desire that a well-defined group of persons shall obtain the compensation given them by the legislature without the technicalities, obstructions, and delays caused by contests over the admissibility of evidence. Without those rules it is easier for workmen to prove their claims, and lawyers are less necessary. Is this gain offset by a greater loss? The best argument for our law of Evidence is that by excluding testimony which is comparatively untrustworthy or which takes time out of all proportion to its value, the trial is hastened and a correct determination of the basic facts is rendered more probable. The Compensation Acts offer a useful opportunity to learn if this argument is valid. Here, where the supposed safeguards have been removed, are the proceedings interminable and the decisions frequently erroneous? P. T. Sherman in the *University of Pennsylvania Law Review* [13] examines the cases under the New York statute and concludes that it would have been wiser to retain the ordinary rules of Evidence. He states that the Industrial Accident Commission, supported by a minority of the judges, has taken advantage of the statute to disregard not only the legal rules making testimony inadmissible, but also the logical principles as to the weight of evidence, and has frequently given compensation because there was a little hearsay testimony on the workman's

[13] "Evidence and Proof under Workmen's Compensation Laws," 68 U. PA. L. REV. 203; see also Reid *v.* Automatic Electric Washer Co., 179 N. W. 323 (Ia., 1920), noted in 69 U. PA. L. REV. 279 (1921), with comment on various statutes. On burden of proof, see 68 U. PA. L. REV. 300; Meadows *v.* Ellerman Lines, [1920] 3 K. B. 544 (C. A.).

side though much outweighed by the defendant's evidence. Many such findings have, he says, been reversed by a majority of the judges on appeal. It may be, however, that as the tribunals become more accustomed to handling testimony which would elsewhere be inadmissible, they will be able to estimate its value with increasing accuracy. Before we decide that the experiment is a failure in these tribunals and should be abandoned, or that *a fortiori* a similar policy of the open door for evidence should not be adopted in the ordinary courts, it would be helpful to have further investigation, *e.g.*, (a) reviews like Sherman's of the decisions in other states; (b) reports by appellate judges on the merits of commission findings as seen in bulk after several years' experience; (c) reports based on commission records and actual observation of commission hearings by persons qualified to compare the workings of their liberal methods with the operation of the rules of Evidence in ordinary civil and criminal proceedings.

II. *Contracts to Alter or Waive the Rules of Evidence.* An article with this title by Wigmore in the *Illinois Law Review*[14] supports the validity of such contracts. A life insurance policy provides that the presumption of death after seven years' disappearance shall not operate; an accident policy, that the accidental character of the injury must be established by an eyewitness other than the policyholder, or that the privilege against corporal inspection is waived, or that a physician may disclose communications from the insured; a surety company agrees that the plaintiff's vouchers of payment shall be conclusive proof of loss.[15] These clauses result from the belief of business men that certain established rules of Evidence promote imposture or delay. We may uphold some of the clauses without committing ourselves to the proposition that a private contract can force a court to adopt a special rule of Evidence. For instance, if an insurance company can limit its liability to exclude deaths in war or by suicide, it can also exclude deaths by disappearance. Ordinary principles of contract allow one to promise as much or as little as he pleases. Again, privileges which

[14] 16 ILL. L. REV. 87 (1921), with a large collection of authorities, many very recent. For other comment on recent cases see 5 MINN. L. REV. 227, 480; 21 COLUMBIA L. REV. 192; 19 MICH. L. Rev. 202; 6 IA. L. BULL. 236.

[15] The conflicting decisions on the clauses are collected in the references of note 14.

may be waived at the trial may also, in reason, be waived anticipatorily in the policy. So far, the only sound limitation on the company's power is, that the clause must not be a trap for the policyholder. The surety policy meets an additional difficulty, that the provision for automatic proof without possibility of countervailing evidence ousts the courts of all substantial jurisdiction. Wigmore asks why not, if business men prefer this method to the lengthy processes of the ordinary trial. Still greater obstacles are presented by a clause agreeing to admit hearsay evidence, for the court is then forced to try the case by unusual methods, and might well refuse to do so.[16] The authorities are divided on all these clauses, but their frequent use in business contracts shows dissatisfaction with the law of Evidence, and whenever these clauses are upheld their operation will furnish useful data on the problem whether the rule of Evidence in question should be abolished by legislation as well as by agreement.

III. *Psychological Criticism.* Reform in the methods of settling questions of mental capacity is urged, not only by lawyers, but by alienists, psychiatrists, and psychologists. Henry W. Taft speaks for the bar in voicing dissatisfaction with medical experts in will cases.[17] Dr. W. A. White, Superintendent of the Government Hospital for the Insane, Washington, D. C., writing on "Expert Testimony in Criminal Procedure Involving the Question of the Mental State of the Defendant,"[18] recommends a statute drawn by the American Institute of Criminal Law and Criminology, which authorizes the court to summon experts who may be questioned by both sides; allows the defendant to be examined by these experts and by the state's experts; sends the defendant to a hospital for observation, where all experts shall have access to him; directs each expert to prepare a written report on which he may be cross-questioned, as a substitute for the discredited hypothetical question, which is to be abolished; and also authorizes all the experts if they see fit to prepare a joint report. The appointment of experts by the court, which need not be limited to mental experts or to criminal cases, is also recommended by a committee of the Board of Circuit

[16] Such a contract was, however, upheld in Thompson *v.* Fort Worth, etc. Ry. Co., 31 Tex. Civ. App. 583, 73 S. W. 29 (1903).

[17] "Comments on Will Contests in New York," 30 YALE L. J. 593, 601 (1921).

[18] 11 J. CRIM. L. & CRIM. 499 (1921).

Judges of Wisconsin. Their report, by Judge E. Ray Stevens,[19] reviews the statutes of the states which already allow such experts and submits a draft statute. It is to be hoped that the Michigan decision[20] invalidating such a statute on the ground that the selection of witnesses is not a judicial act, represents the isolated attitude of a court which has shown itself noticeably inhospitable to modern legal methods.[21] The value of mental examinations of defendants in criminal cases and of juvenile delinquents has been well proved.[22] It suggests the possibility of similar examinations of witnesses of alleged mental defectiveness or psychopathic tendencies.[23] Although the law has refused to admit lay evidence that a witness's mentality is low,[24] except when it approaches insanity, because such evidence is too uncertain, the report of a Binet-Simon or other intelligence test would be of distinct value to a trained judge in weighing testimony, and attempts to introduce such reports have recently been made.[25] Undoubtedly the wide use of such tests in the army will have its influence. The difficulty is, however, that these tests of a witness will go, not to a judge, but to the jury. Hence their value is much less than for the juvenile delinquent, who gets no jury trial. The defendant in a criminal case is also likely to be a better subject of intelligence tests than a witness, if the criminologists succeed in their plan to have the jury pass only on the question whether the accused committed the criminal act with *mens rea*, leaving his mental responsibility and his

---

[19] "Expert Testimony," 10 J. CRIM. L. & CRIM. 188 (1919). See also G. W. JACOBY, THE UNSOUND MIND AND THE LAW, 1918; reviewed in 33 HARV. L. REV. 881.

[20] People *v.* Dickerson, 164 Mich. 148, 129 N. W. 199 (1910).

[21] Anway *v.* Grand Rapids Ry. Co., 211 Mich. 592, 179 N. W. 350 (1920) — declaratory judgments invalid; Wattles *v.* Upjohn, 211 Mich. 514, 179 N. W. 335 (1920) — proportional representation invalid; Atty. Gen. *ex rel.* Dingeman *v.* Lacy, 180 Mich. 329, 146 N. W. 871 (1914) — Detroit court of domestic relations invalid.

[22] See, for example, T. W. Salmon, "Some New Problems for Psychiatric Research in Delinquency," 10 J. CRIM. L. & CRIM. 375 (1919); H. Olson, "The Psychopathic Laboratory of the Municipal Court of Chicago," 92 CENT. L. J. 102 (1921).

[23] Tom A. Williams, "Some Remarks about Testimony" (summarized from the experience of French psychiatrists and experts in legal medicine), 10 J. CRIM. L. AND CRIM. 609 (1920); see also 64 SOL. L. J. 579 (1920).

[24] Bell *v.* Rinner, 16 Ohio St. 45 (1864).

[25] State *v.* Wade, 113 Atl. 458 (Conn., 1921), after use of Binet-Simon reports of the defendant's mentality, similar reports on witnesses were excluded by the trial court; held within its discretion, as a question of remoteness. The tests were applied to the defendant in State *v.* Schilling, 112 Atl. 400 (N. J., 1920).

subsequent treatment, whether in a prison, asylum, or hospital, to be determined by a board on the basis of expert recommendations. The mental capacity of a witness will always have to be left to the jury, so long as there is a jury to determine the issues of fact on which this witness testifies, and it is doubtful whether such a rough and ready instrument of justice can cut to the fine lines involved in an intelligence test. W. M. Marston[26] of the Massachusetts bar has experimented with blood pressure and other tests to determine the veracity of witnesses, and states that the results of these tests were corroborated by the subsequently disclosed facts, already known to the witness. Lawyers will await the results of such investigations with open minds. They cannot, of course, be substituted in courts generally for present methods of examination until their usefulness is thoroughly demonstrated. If such tests ever are adopted, it is probable that the jury system will have to be abandoned, unless education will have advanced so far that twelve men picked at random will adequately absorb blood pressures, time reactions, and intelligence quotients, and combine the mass into a just verdict. In other words, the jury might also be subjected to an intelligence test.

Preliminary Topics

For convenience the various topics of Evidence will be considered in the order adopted by *Thayer's Cases*.

Judicial Notice has been taken of such matters of common knowledge as the increased cost of living,[27] the meaning of "fifty-fifty,"[28] and that a new Ford is worth over two hundred dollars,[29] but not of such controverted facts as the intoxicating qualities of Jamaica ginger[30] or the distance through which odors from automobiles will travel.[31] Certain information not generally known is used as the basis of judicial action without being put in as evidence because it is part of a judge's duty to possess or acquire such infor-

[26] "Psychological Possibilities in the Deception Tests," 11 J. Crim. L. & Crim. 551 (1921).

[27] Hurst *v.* C. B. & Q. R. R. Co., 219 S. W. 566 (Mo., 1920), noted in 10 A. L. R. 179.

[28] Chafin *v.* Main, etc. Co., 85 W. Va. 459, 102 S. E. 291 (1920). See "Slang or Colloquial Phrases in the Law of Evidence," 11 A. L. R. 661.

[29] State *v.* Phillips, 106 Kan. 192, 186 Pac. 743 (1920).

[30] Commonwealth *v.* Sookey, 236 Mass. 448, 128 N. E. 788 (1920).

[31] Texas Co. *v.* Brandt, 79 Okla. 97, 191 Pac. 166 (1920), noted in 91 Cent. L. J. 353.

mation. Thus he must know the statutes of his jurisdiction, and the House of Lords recently took judicial notice of a material section which was entirely overlooked in the lower court,[32] though some courts hold that a point cannot be raised for the first time on appeal. The municipal court of Chicago is required by statute to take judicial notice of the city ordinances, but the Illinois Supreme Court will not do so on appeal from the municipal court, and declares that a statute obliging it to do so would be unconstitutional.[33] This and the earlier refusal to take judicial notice of the rules of practice of the municipal court [34] show a regrettable willingness of the Illinois Supreme Court to complicate appellate procedure in a court which aims to make the settlement of small disputes simple, cheap, and speedy.

Presumptions and Burden of Proof. Although the existence of any given presumption and its exact nature and effect are not determined by the law of Evidence but by the policies of that portion of the substantive law to which the presumption relates, nevertheless when the presumptions are thus created it seems a task of the law of Evidence to classify and analyze them. The same is true of the rules of Burden of Proof in various situations. Consequently most of the recent material on these two topics need not be discussed here,[35] but a few authorities raising problems of classification and analysis are worth considering.

Presumptions may be classified according to their binding effect upon the jury into three groups. (1) Logical inferences, — if the

---

[32] Glebe Sugar Refining Co. *v.* Greenock, [1921] 2 A. C. 66, [1921] W. N. 861. See "Overlooking Statutes," 30 YALE L. J. 855.

[33] Chicago *v.* Lost, 289 Ill. 605, 124 N. E. 580 (1919), noted in 29 YALE L. J. 460.

[34] Sixby *v.* Chicago City Ry. Co., 260 Ill. 478, 103 N. E. 249 (1913).

[35] Presumptions: Long absences, Greig *v.* Trustees of the Widows' Fund, [1920] 2 SCOTS L. T. 383, showing the entirely different law of Scotland. "Disposition of Life Insurance which, by terms of policy, is dependent upon survivorship, where there is no presumption or proof of survivorship," 5 A. L. R. 797, note. Legitimacy, *In re* McNamara's Est., 181 Cal. 82, 183 Pac. 552 (1919), noted in "Presumption of Legitimacy of Child born in Wedlock," 33 HARV. L. REV. 306, 315; "Presumption of legitimacy of child born to married woman as affected by lapse of more than normal period of gestation after access by husband," 7 A. L. R. 329; State *ex rel.* Burkhart *v.* Ferguson, 187 Iowa, 1073, 174 N. W. 934 (1919), noted in "Presumption as to paternity of child conceived or born before marriage," 8 A. L. R. 427. Impotency, after triennial cohabitation, Tompkins *v.* Tompkins, 111 Atl. 599 (N. J. Eq., 1920), noted in 69 U. PA. L. REV. 388; "Presumption of identity of persons from identity of name in chain of title to real property," 5 A. L. R. 428, note. Foreign statutory law, Freyman

jury find A and B, they may reasonably find X, but are not obliged to do so. This is not a rule of law at all, but merely a statement of experience. The presumption of continuance of life is an example.[36] (2) Rebuttable presumptions, — if the jury find A and B, they must find X, unless the presumption is rebutted by additional evidence. This is a rule for the administration of evidence, and so may be called part of the law of Evidence, though not a rule of exclusion like the hearsay rule. Thus, a promissory note is presumed to be given for consideration, but the maker may prove want of consideration. (3) Conclusive presumptions, — if the jury find A and B, they must find X, regardless of the additional evidence. This is not really a rule of Evidence or a presumption at all, but a rule of substantive law stated in evidential language. For instance, section 16 of the Negotiable Instruments Law provides, "Where the instrument is in the hands of a holder in due course, a valid delivery thereof by all parties prior to him so as to make them liable to him is conclusively presumed." It makes no difference if the maker can prove that the note was stolen from him by the payee. What the statute means is that want of delivery is no defense against a holder in due course.

A subdivision of class (2) is necessary. (a) Some rebuttable presumptions have no logical core, but rest on some policy of that par-

---

v. Day, 108 Wash. 71, 182 Pac. 940 (1919), noted in 33 HARV. L. REV. 315 (1919). "Venereal disease as evidence of adultery," 5 A. L. R. 1020, note. "Insurance: presumption and burden of proof as to accident in case of death from poison," 7 A. L. R. 1226, note. "Presumption against suicide in workmen's compensation cases," 5 A. L. R. 1680, note. Creditor's account, 20 COLUMBIA L. REV. 805. Burden of proof in Roman Law, Roscoe Pound, "The Maxims of Equity," 34 HARV. L. REV. 809, 814, note.

Burden of proof: This is also involved in several references in the preceding paragraph. Self-defense, upon accused, State *v.* Mellow, 107 Atl. 871 (R. I., 1919), noted in 33 HARV. L. REV. 609. Theft insurance, Miller *v.* New Amsterdam Casualty Co., 110 Atl. 810 (N. J., 1920), noted in 91 CENT. L. J. 388. Mistake in receipt, on recipient, Ill. Steel Bridge Co. *v.* Wayland, 107 Kan. 532, 192 Pac. 752 (1920), noted in 19 MICH. L. REV. 347. Loss by bailee, 68 U. PA. L. REV. 179 (1920). Alteration, Kauffman *v.* Logan, 187 Iowa, 670, 174 N. W. 366 (1919), noted in 29 YALE L. J. 355; "Upon whom should the burden fall to establish the validity of an alteration in an instrument?" 68 U. PA. L. REV. 264 (1920). *Res ipsa loquitur*, in blasting, Jeremiah Smith, "Liability for Damage to Land by Blasting," 33 HARV. L. REV. 542, 553 (1920). Fire from locomotive sparks, Page *v.* Camp Mfg. Co., 180 N. C. 330, 104 S. E. 667 (1920), noted in 19 MICH. L. REV. 451. See also several notes in vols. 5–13 A. L. R.

[36] Its binding force seems to be much greater in Scotch law, Greig *v.* Trustees of the Widows' Fund, [1920] 2 SCOTS L. T. 383.

ticular branch of the substantive law with which they are connected. Thus, since many promissory notes are given for accommodation, the presumption of consideration rests on no great probability that a note was given for value, but on the policy of the law of negotiable instruments that the enforcement of a note should be made a simple matter. Again, the presumption that if goods are handled by several carriers, damage in transit was caused by the last carrier [37] is obviously based on the justice of relieving the shipper of the initial burden of investigation and putting it on some one who has facilities for doing it. Any carrier might have been chosen; the Carmack Amendment [38] throws the burden on the first carrier. (b) Other rebuttable presumptions rest on experience as well as policy. They do have a logical core. The fact that A and B occur, makes it more probable that X is true, and although the presentation of evidence in rebuttal relieves the jury from their binding obligation to find X, still this logical inference must be weighed in the scale against the rebutting evidence. For instance, the presumption that a letter, properly addressed, stamped, and mailed, arrives, may justify a finding of arrival even though the addressee gives some evidence to the contrary. Such a presumption is really in class (1) as well as class (2).

Consequently, it is often difficult to decide whether a particular presumption is only a logical inference or is a rebuttable presumption with a logical core. Thus in two recent prosecutions for receiving stolen goods the defendant's possession was proved. A logical inference of guilty knowledge might permissibly be drawn by the jury, but was it right for the trial judge to go further and charge that possession raised the presumption of guilt unless it was explained to the satisfaction of the jury? [39] The courts disagree. Another court holds that the presence of the defendant at a still ready for operation proves his possession unless rebutted.[40]

---

[37] See F. H. Bohlen, "The Effect of Rebuttable Presumptions of Law upon the Burden of Proof," 68 U. PA. L. REV. 307, 320 (1920).

[38] Act June 29, 1906, c. 3591, § 7, 34 STAT. AT L. 595, U. S. COMP. STAT., 1918, § 8604 a.

[39] Pearrow *v.* State, 146 Ark. 182, 225 S. W. 311 (1920), held error; State *v.* Ross, 39 N. D. 630, 179 N. W. 993 (1920), not error, by a divided court; both noted in 19 MICH. L. REV. 565, which agrees with Arkansas.

[40] Barton *v.* United States, 267 Fed. 174 (C. C. A., 4th Circ., 1920); 30 YALE L. J. 412, thinks there is merely a logical inference.

The necessity of further subdivision of rebuttable presumptions is maintained by F. H. Bohlen in an article, "The Effect of Rebuttable Presumptions of Law upon the Burden of Proof."[41] All such presumptions shift the burden of coming forward with evidence to the opponent. Bohlen thinks that some also shift the burden of establishing the issue by weight of evidence, — risk of non-persuasion, as Wigmore calls it. This is contrary to Wigmore's statement that the risk of non-persuasion never shifts.[42] It is hard to answer Bohlen's argument, especially when applied to presumptions which can only be rebutted by more than a preponderance of evidence.[43] If the presumption of legitimacy from birth in wedlock with possibility of access is urged on behalf of the party having the initial risk of non-persuasion, the burden seems to shift to the opponent to establish illegitimacy by evidence beyond a reasonable doubt.[44] Most presumptions, however, should not properly have this double effect, despite the confusion in the cases between the two burdens of proof.[45] Thus the presumption of sanity in a will case is rightly interpreted in a recent Illinois decision [46] to place the burden of offering evidence of the testator's mental condition upon the contestant, while the risk of non-persuasion always remains with the proponent.

The so-called presumption of innocence in criminal cases is in a class by itself. In the cases of rebuttable presumptions which have a logical core, the process of rebutting the presumption consists in taking the logical inference and weighing it against the rebutting evidence. Such a process cannot rightly be applied to

---

[41] 68 U. PA. L. REV. 307 (1920).

[42] 4 TREATISE ON EVIDENCE, § 2489.

[43] The note in 33 HARV. L. REV. 306 agrees with Bohlen's position as to the presumption of legitimacy, but thinks it the only presumption which properly shifts the risk of non-persuasion.

[44] The alleged son of X, the deceased owner of Blackacre, brings ejectment against the brother of X, in possession of Blackacre. The plaintiff has the risk of non-persuasion. He proves that his mother W was the wife of X, and that he was born in wedlock, while X had access. The defendant now seems to have the burden of establishing illegitimacy beyond a reasonable doubt.

[45] On the confusion in Bills and Notes, see BRANNAN'S NEGOTIABLE INSTRUMENTS LAW, 3 ed., 217; Z. Chafee, Jr., "Progress of the Law, Bills and Notes," 33 HARV. L. REV. 255, 274 (1919).

[46] Donovan *v.* St. Joseph's Home, 295 Ill. 125, 129 N. E. 1 (1920), approved by 15 ILL. L. REV. 467.

the presumption of innocence, for it has no logical core. There is no probability that a man indicted by a grand jury is usually innocent. It is not an element of the proof in a criminal case, but only a rule of policy as to the burden of proof. When the pile of facts on the state's side, including the logical inferences in its favor, some of which may have been embodied in rebuttable presumptions, is set beside the defendant's pile of facts and inferences, the defendant must not be convicted unless the state's pile is a good deal the higher. The presumption of innocence merely expresses the measure of this distance; to regard it as also a fact in the defendant's pile would be to make it count twice.[47] To vary the metaphor, an Iowa case [48] raises the interesting problem whether the evidence against the accused should be regarded as a chain, each link of which must be proved beyond a reasonable doubt, or only as a cable, which is strong enough if it sustains the burden as a whole regardless of the strength of each strand in the testimony. The case takes the chain theory, but the cable theory seems preferable; and a Rhode Island decision goes even further, holding that the accused must establish self-defense by a preponderance of the evidence.[49]

If the presumption of innocence be correctly analyzed above, it has little or no place in civil proceedings, except possibly in disbarment, which imposes severe personal consequences.[50] Thus, if forgery is set up as a defense to a promissory note, it is enough to establish it by a preponderance of the evidence, though it is a crime, for no criminal consequences are imposed by the judgment.[51] In a California case,[52] workmen's compensation was claimed for the death of an employee in an automobile accident. The defense was, that he was exceeding the legal speed limit, and was consequently outside the scope of employment. The court held that the strong circumstantial evidence to this effect might have been

---

[47] State *v.* Smith, 65 Conn. 283, 31 Atl. 206 (1894).

[48] State *v.* Smith, 180 N. W. 4 (Iowa, 1920), criticized adversely by 30 YALE L. J. 542.

[49] State *v.* Mellow, 107 Atl. 871 (R. I., 1919), approved by 33 HARV. L. REV. 609.

[50] "Presumption of innocence in disbarment proceeding," 7 A. L. R. 93, note; 5 MINN. L. REV. 141.

[51] *Contra*, Colby *v.* Richards, 118 Me. 288, 107 Atl. 867 (1919), criticized adversely in 4 MINN. L. REV. 298.

[52] U. S. Fidelity & Guaranty Co. *v.* Industrial Accident Comm., 58 Cal. Dec. 190 (1919), by a divided court; adversely criticized in 8 CAL. L. REV. 101.

outweighed by the presumption that he would not violate the law, and refused to set aside a finding of liability. It may be that if a crime incidentally involved in a civil case is heinous, its commission is improbable under the circumstances, but there ought not to be such an inference of innocence in all cases, and overspeeding is so common that an inference against it seems of no weight.

The problem of conflicting presumptions becomes much less difficult if the investigation in each case be directed to the ascertainment of the logical core of the respective presumptions, instead of the impracticable attempt to ascertain the comparative strength of conflicting rules of law. The suggested method will not remove the conflict, but it is now largely a conflict of evidence, since logical inferences are evidence, and hence the method resembles any other endeavor to ascertain the truth from opposing masses of testimony. The jury is left free to apply its reasoning powers to the evidence, subject to the same logical principles as an historian or a congressional committee. Two recent cases where a marriage was in dispute bring out the merits of this method. In *Re Hilton's Estate*,[53] a woman, W, claimed the right to administer as widow the estate of H, who died in 1915, alleging a marriage to H in 1881. She lived with H till 1890, but there was evidence that the intercourse was illicit. H had married X in 1896; W had married Y in 1905, and was now living with Y. The court denied her claim, on the ground that every presumption was in favor of the validity of the two later marriages. A similar presumption would seem to apply to the 1881 marriage, and the California court would have said that the nine years cohabitation was entitled to the benefit of the presumption of innocence; but her cohabitation with Y would also have to be presumed innocent. Among three presumptions of marriage and two of innocence, how can we say which is entitled to priority? The sensible solution is this: Since one of W's two marriages must be invalid in the absence of any evidence of divorce, the law should abandon the policy of upholding either of them, and test each by the weight of the evidence. The testimony in favor of the 1881 marriage was slight; the 1905 ceremony was admitted. Therefore, the decision denying her claim was right on

[53] 263 Pa. 16, 106 Atl. 69 (1919); the court's reasoning is adversely criticized in 68 U. PA. L. REV. 82.

the facts. The court also introduced another complicating legal rule, that she was estopped to set up the illegality of her second marriage. Such a rule would be very objectionable if the first marriage was undisputed. A better ground for its action would be that her conduct showed she was unfit to administer H's estate, since on her own showing she was an adulteress if she was H's widow. In *Smith* v. *Smith*,[54] H sued in 1920 to annul his marriage with W, on the ground that she then had a first husband living, X. The evidence showed that X, a man of 65, married W in 1896 and deserted her one month later. He was not heard from since, except that she testified that six months after her marriage to X, she was told he was in a hospital because of a street railway accident. She married H in 1900 and bore him a child, who was still alive. The court dismissed the action, as not sufficiently established. The opinion sets up in H's favor the presumption of the continuance of X's life; and in W's favor the presumption of the validity of the second marriage and the presumption of innocence. It balances these presumptions, and concludes that the presumption of life is overborne in such conflicts, according to the authorities. The same result could be reached without applying any such scale of marking to presumptions. The presumption of marriage is a rebuttable presumption. It sometimes has a slight logical core, because the serious social and criminal penalties for illegal marriage may dissuade persons from marrying except when it is lawful. In this case, however, it has no such core, because all the evidence upon which the parties acted in 1900 is before the court, and if that does not make X's death probable, the mere fact of a ceremony adds nothing. However, the presumption also rests on a strong policy that the marriage should be upheld, unless disproved by weighty evidence, because of morality and the interests of the child, whom annulment would render illegitimate. Bohlen's theory is helpful here; the effect of the presumption is to place a heavy burden of proof on H. The situation is different from *Hilton's Estate*,[55] where one marriage had to be sacrificed, whatever happened, and consequently the law had no policy behind any particular marriage. Now, examine H's evidence to see whether he sustains the requisite

[54] Smith *v.* Smith, 185 N. Y. Supp. 558 (1920); reasoning adversely criticized in 34 HARV. L. REV. 791.

[55] See note 53, *supra*.

burden of proof. The principal fact in his favor is that X was alive three years before the 1900 marriage. From this X draws a presumption of the continuance of X's life until 1900. But this presumption differs entirely from the other. It rests on no social policy; it is a mere logical inference, to be judged like any other fact for what it is worth under the circumstances. In view of X's age and the reported accident, there is not a great probability that X lived three years, not enough to make H's pile of facts so high as the law requires. Therefore, H loses. On the other hand, the logical inference of continuance of life might be strong enough to defeat the claimant to an executory devise conditioned on X's death before 1900, for then the burden of proof would be the other way.

Zechariah Chafee, Jr.

HARVARD LAW SCHOOL.

(*To be concluded.*)